Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., a wholly owned subsidiary *and* Retail Store Employees Union, Local 1001, Chartered by United Food and Commercial Workers International Union, AFL–CIO. Case 19–CA–13680

29 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 13 December 1982, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., a wholly owned subsidiary, Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Seattle, Washington, on August 24 and 25, 1982. On February 18, 1982, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on June 30, 1981,[1] alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., a wholly owned subsidiary, herein called the Respondent, has been a Washington State corporation, with office and place of business in Seattle, Washington, inter alia, where it engages in the business of operating retail department stores. During the 12-month period prior to issuance of the complaint, a representative period, the Respondent derived gross revenues in excess of $500,000 and, further, purchased and caused to be transferred and delivered to its State of Washington facilities goods and materials valued in excess of $50,000 directly from sources outside the State of Washington, or from suppliers within the State of Washingtion who, in turn, obtained those goods and materials directly from sources outside the State of Washington. Therefore, I find, as admitted by the answer and amended answer, that at all times material, the Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all times material Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

This case involves a change in commission rates paid to cosmetics sales employees represented by the Union. The first issue posed is whether reductions in commissions paid to unit employees by third parties, not bound to collective-bargaining agreements between the Respondent and the Union, are a mandatory subject of bargaining for the Respondent. If it is concluded that these commissions are a mandatory subject of bargaining, then the next issue posed is whether the Union waived its right to bargain about changes in them by virtue of certain provisions in the current collective-bargaining agreement. For the reasons set forth below, I conclude that the Respondent had been obliged to bargain with the Union insofar, as its involvement in those changes had been concerned, and, further, conclude that it cannot be said that the Union had waived its statutory right to bargain about those changes by virtue of the collective-bargaining agreement and the bargaining history.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

Since 1967, the Respondent has operated a number of department stores in the Seattle area, having initially succeeded Rhodes of Seattle, Inc. as the owner of certain stores during that year. Rhodes had been a member of a multiemployer bargaining association that had bargained with the Union's predecessor as the representative of certain employees working in the department stores operated by association members. Once it had become the owner of the stores formerly operated by Rhodes, the Respondent began bargaining as an association member. However, as it opened additional stores, the Respondent commenced bargaining with regard to employees working in them on a single-employer basis. By the early 1970's, the Respondent had ceased altogether bargaining

[1] Unless stated otherwise, all dates occurred in 1981.

on an association basis and, thereafter, had negotiated collective-bargaining agreements covering its department store employees on a single-employer basis. The most recent agreement is effective from June 8, 1980, through June 7, 1983.[2]

Among the items merchandised in the Respondent's department stores are cosmetics. Historically, most, although not all, cosmetics manufacturers[3] enter into representative or demonstration agreements with retailers, such as the Respondent, whereby the former provides a 10-percent rebate on sales of their own products made at the latter's stores. At the total discretion of the vendor, those rebates may be paid entirely to the retailer, as is the practice in the drug store industry, to supplement the retailer's costs of selling cosmetics. Alternatively, the vendor may decide to allocate all of the rebate to the employees who sell the cosmetics.[4] However, normal practice appears to be that vendors allocate a certain percentage of the rebate to employees who make the sales and the rest of the rebate to the retailer. Although there is no total uniformity throughout the cosmetics sales area, the fairly common allocation is 3 percent to the sales employees and 7 percent to the retailer.

According to the Respondent's cosmetic, fragrance, and giftware buyer, Susan Engle, prior to January 5, the Respondent's cosmetics sales employees' commission "average was five percent. There was one at ten percent and I believe that there were three at six percent. The rest were at five." Based on its belief that it was not earning sufficient income under this allocation and its feeling that if employees continued to receive so large a percentage of commissions it would have to reduce the number of beauty advisors that it employed or, alternatively, would have to convert to completely self-service cosmetics departments, the Respondent made a decision to initiate a request that its vendors reduce all employee commissions to 3 percent and accord the Respondent 7 percent of the 10-percent rebate. Before making this suggestion to its vendors, the Respondent did not notify the Union that it intended to do so. The vendors agreed to make the changes suggested by the Respondent and all employee commissions were reduced to 3 percent effective January 5. Again, the Respondent did not notify the Union prior to January 5 that the change would be made.

By letter dated January 15, the Union protested the commission reductions and requested that the former rates be restored, with cosmetics sales employees being made whole for losses that they sustained by virtue of the reductions. By letter dated February 9, the Respondent replied that article 10.07 of the collective-bargaining agreement "indicates that bonuses shall not be considered as wages, but are to be considered as extra compensation and that furthermore, such bonuses are the option of the employer and may be changed or discontinued at any time without notice." Article 10.07 of the current agreement provides:

> All bonuses and discounts paid or given to the employee shall not be considered as wages, but are to be considered for the purpose of this Agreement as extra compensation over and above the minimum wage provided for in this Agreement. All bonuses and discounts are at the option of the Employer and may be changed, or discontinued at any time without notice. Bonuses and discounts shall not be used to defeat the wage provisions of the Agreement.

The language that now is article 10.07 first appeared in the 1969 agreement. It then had been continued in the same form in succeeding agreements. The language had been proposed initially by the association because it had been held, by the Boad or by an arbitrator, that the then-existing agreement did not permit signatory employers to unilaterally change employee discounts. Thus, Respondent's vice president, Calvin Hendricks, testified that the problem giving rise to proposal of the language "involved primarily employee discounts, change of company policy concerning employee discounts and we lost that decision and the corporate policy was made that we would not sign any further labor agreements without a provision that we had full control over that type of benefit."

It is undisputed that during the 1969 negotiations, there had been specific discussion of commissions in two related contexts. First, as initially proposed by the association, the language that now is article 10.07 had contained the word "commissions," as well as bonuses and discounts. Second, prior agreements had specified commission rates to be paid to various employee classifications.[5] The Union had agreed to delete all of these references to commission rates and the association had agreed to delete "commissions" from the provision that is now article 10.07. According to the undisputed testimony of the then assistant to the president and director of collective bargaining for the Union, Edgar T. Hardy, the parties had "specifically left the word 'commissions' out of [the clause that is now art. 10.07] because of the fact even though we deleted most of the commission departments out of the Rhodes contract at that time, there were still commissions being paid in cosmetic and possibly in the shoe department, I don't recall."

[2] At no place in that agreement is there a satisfactory description of the unit for which the Union is the representative. Apparently perceiving the difficulty in formulating a unit description based on the agreement, the General Counsel alleged the appropriate unit, in the complaint, as being "[t]he unit of employees described in the collective bargaining agreement between Respondent and the Union, dated July 21, 1980," an allegation admitted by the Respondent. In view of the ambiguity in the current agreement, the parties' seeming understanding of the employees included in and excluded from the unit as a result of their substantial bargaining history, and the risk of improperly including or excluding employees that might result from attempting to formulate a unit description on the basis of the record in this proceeding, I will describe the appropriate unit, as has the General Counsel in the complaint, by reference to the current collective-bargaining agreement.

[3] Also referred to as vendors and as suppliers.

[4] Also referred to as cosmeticians, as line persons, as beauty operators, and as beauty advisors.

[5] But, not to cosmetics sales employees. The commissions paid to them by vendors, as their portions of the vendors' rebates, had not been enumerated in prior agreements due to the variances in commission rates paid by the various vendors. To have attempted to enumerate all of them would have been too unwieldy.

As stated above, the language contained in article 10.07 of the current agreement had remained in each successive collective-bargaining agreement since the one negotiated in 1969. Apparently commencing with negotiations for the 1977 agreement, the Union had attempted to seek agreement to an amendment of that language by adding a "company benefits" provision to it. That is, the Union had sought to have it amended to specifically provide, inter alia, that before the Respondent made changes allowed by the provision, "the Union will be given reasonable notice of the contemplated changes. The [parties] will then meet and negotiate on these contemplated changes." However, the Respondent consistently had resisted this amendment and it never became a part of article 10.07. So far as the record discloses, there never had been any discussion of commissions, including third-party vendor commissions, in connection with the proposals to amend the language of article 10.07 by adding a "company benefits" provision to it.

Hendricks denied that any official of the Union, including Hardy specifically, had ever said that third-party vendor commissions would be the subject of bargaining. However, Hendricks testified that during negotiations for the current agreement, he had seen fit to raise the subject of the scope of article 10.07, pointing out to the Union's representatives "that when we talked about bonuses, discounts, we wanted them to understand that that included all the cosmetic bonuses or commissions, as well." Yet, Hendricks was unable to recall what Hardy had said in response to that remark. Hardy testified the Union and its representatives "have always taken the position with Rhodes and [the Respondent] and all other stores that have commissions that commissions will continue to be a subject of bargaining, not only in departments where commissions are spelled out in the contract, but in departments where commissions are paid by a vendor or otherwise that would not—they would not be taken away from the people in the midst of a contract which, in effect, would be a reduction in wages."[6]

Finally, during negotiations for the current agreement, the parties added a new provision:

> 8.10 CONTRACT MINIMUMS
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> Except as provided in this Agreement, the terms herein are intended to cover only minimums in wages, hours, and working conditions, benefits and other terms and conditions of employment in effect and may reduce the same to the minimum herein prescribed without the consent of the Union.

It is undisputed that this provision had been proposed by the Respondent to cover situations where employees had been given merit increases and, then, due to changed circumstances, the Respondent desired to discontinue payment of the amount of that increase. Thus, as Hardy explained:

> Years ago . . . we took the position with the employers that if a merit increase was put into effect, they had to maintain that and the employers took the position if that was the case, they were not going to give any more merit increases. We did not want to preclude our members from receiving additional money, so we agreed that they could give merit increases and take them back if there were—the reason that it was given was no longer in existence.
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> . . . .
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> As I testified earlier, the employers took the position that in the future they would not give any merit increases to employees if they were going to be frozen into them and we did not want to deprive our members from receiving additional pay, so we agreed that if circumstances changed under which they were given the merit, that the merit also could be taken away, such as extra responsibility and then no longer having the extra responsibility and so on
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> . . . .

Analysis

The Respondent does not dispute that ordinarily commissions paid to employees are a mandatory subject of bargaining about which employers are obliged to bargain with their employees' bargaining representative. Nor does the Respondent deny that it did not notify and afford the Union an opportunity to bargain about the changes in commission percentages implemented on January 5. However, as set forth above, the Respondent argues that because the commissions paid to cosmetics sales employees emanate from third parties, who have total discretion over whether or not to pay them, therefore the Respondent has no control over them and they cannot be treated as mandatory subjects of bargaining by the Respondent.

Of course, employers cannot be expected to bargain concerning third-party changes over which those employers have no control or influence.[7] Yet, the mere fact

[6] There is no basis for concluding that Hardy would not have appreciated the distinction between the term bonuses, on the one hand, and the term "commissions," on the other. For approximately 6 months before signing the current agreement with the Respondent, Hardy had signed an agreement with the Greater Seattle Retail Drug Association that included a provision stating:

> All bonuses, discounts and commissions paid or given to the employees shall not [be] considered as wages, but are to be considered for the purpose of this Agreement as extra compensation over and above the minimum wage provided for in this Agreement. All bonuses, discounts, and commissions are at the option of the Employer and may be changed or discontinued at any time without notice. Bonuses, discounts and commissions shall not be used to defeat the wage provision of this Agreement.

[7] Nevertheless, the effects of such changes on terms and conditions of employment of employers' employees may well be a proper subject of bargaining inasmuch as the employers do control their own employees' terms and conditions of employment. For example, a vendor's reallocation in the employee-commission portion of a rebate, which results in reduction in sales employees' income, may lead the bargaining representative to propose reallocations in employee benefits paid by the employer, in effect sacrificing benefits in other areas to preserve current income levels, in a fashion similar to that suggested in other contexts. See, e.g., *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 213–214 (1964). This, however, is an issue that is not posed by either the pleadings or the facts of this case inasmuch as there is no evidence that the Union made any request to bargain about the effects of the reduced commissions. For these reasons, and in view of my disposition of the issues that are posed, the issue of whether or not a duty to bargain concerning the effects of third-party changes on unit employees is not one that need be reached in this case.

that an employee benefit emanates from third parties does not automatically preclude all further analysis of an employer's duty to bargain about changes or discontinuance of them by those third parties. For, where an employer can influence third-party decisions concerning modifications and continuance of employee benefits, then to that extent the employer possesses the ability to affect its own employees' terms and conditions of employment and, concomitantly, is obliged to bargain about changes that it can influence. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979).

The instant case provides an excellent illustration of this principle. There is no evidence that the vendors independently had been planning to consider changes in rebate allocations. The Respondent concedes that their reconsideration of rebate allocations had been generated by its own overtures to them, requesting a reduction in the proportion of rebates allocated to commissions. Consequently, so far as the record discloses, the Respondent's cosmetics sales employees would not have suffered a reduction in their commissions but for a process of reconsideration initiated by the Respondent.

Moreover, the Respondent had felt compelled to request reallocation of rebates because it had believed that it had not been earning enough under the then-existing allocation and had felt that the only other alternatives to reallocation, available to it, would be either reduction in the number of cosmetics sales employees employed or conversion to self-service cosmetics departments. Yet, cost of operations and its effect on the employee complement "have long been regarded as matters peculiarly suitable for resolution within the collective-bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests." *Fibreboard Paper Products*, supra. In short, had the Respondent first approached the Union regarding its problem, a negotiated solution might have been reached, through collective bargaining, by making changes in other areas that would have resolved the Respondent's difficulty without adversely affecting cosmetics sales employees' commissions. "National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining." *Ford Motor Co. v. NLRB*, supra, 441 U.S. at 499. Of course, had it not been possible to reach a solution through the collective-bargaining process, the Respondent then would have been "free to act . . . even in the absence of union approval." *NLRB v. United Brass Works*, 287 F.2d 689, 698 (4th Cir. 1961).

Therefore, I conclude that vendor commissions paid to cosmetics sales employees are a mandatory bargaining subject to the extent that the Respondent is able to initiate or to influence vendor consideration of rebate proportions allocated to commissions. Absent other considerations, the Respondent is obliged to notify and afford the Union an opportunity to bargain about changes that the Respondent intends to recommend that vendors make in the commission portion of rebates before the Respondent makes those recommendations to the vendors. However, as set forth above, the Respondent argues that other considerations are present in the instant case. Specifically, it argues that articles 8.06 and 10.07 of its collective-bargaining agreement permit it to unilaterally act to reduce commissions. That is, the Respondent contends that the Union has waived its right to bargaining about this subject.

As concluded above, the Union has a statutory right to bargain concerning the exercise of the Respondent's ability to influence changes in cosmetics sales employees' commissions. Of course, that statutory right can be waived. However, "there is a presumption that employees and labor organizations in their collective-bargaining agreements, have not abandoned rights guaranteed them in the Act." *A-1 Fire Protection*, 250 NLRB 217, 219 (1980), remanded on other grounds 676 F.2d 826 (D.C. Cir. 1982). "Instead, it was incumbent on Respondent, if it sought to limit or restrict the Union's statutory right, to obtain the waiver." *Park-Ohio Industries*, 257 NLRB 413, 414 (1981).

"Waiver is the intentional relinquishment of a known right and thus entails some inquiry into the motive of the party against whom it is applied." *Larkins v. NLRB*, 596 F.2d 240, 247 (7th Cir. 1979). For a waiver of statutory rights to exist, it must be "express," *Communications Workers of America Local 1051 v. NLRB*, 644 F.2d 923, 928 (1st Cir. 1981), and in language "clear and unmistakable. Likewise, there must be a conscious relinquishment by the Union clearly intended and expressed to give up the right." *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (8th Cir. 1979), and cases cited therein. According, in making a determination as to whether or not a waiver exists, resort cannot be had purely to a "simplistic formula." *Radioear Corp.*, 214 NLRB 362 (1974); Accord: *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918, 922 (D.C. Cir. 1979). Instead, "[a] finding of waiver depends upon whether an analysis of the contractual language and the facts and circumstances surrounding the making and administration of the collective bargaining agreement indicates whether there has been a clear relinquishment of the bargaining right." *American Oil Co. v. NLRB*, 602 F.2d 184, 188 (8th Cir. 1979).

While article 10.07 lists "bonuses and discounts," it makes no mention of "commissions." Accordingly, commissions are not expressly covered by article 10.07 and it cannot be concluded that that article expressly waives the Union's statutory right to bargain about that subject during the term of the agreement. In its brief, the Respondent argues that the dictionary definition of "bonus" encompasses the elements of commission as well. But, a determination of waiver is dependent on what the parties contemplated in negotiating a particular clause, not on what meanings might be ascribed to it by other parties. Here, there is no evidence that during the negotiations in 1969, the parties had intended the word bonuses to embrace commissions, as well. To the contrary, Hardy testified credibly that when the language had been negotiated, the Union had expressly excepted from its ambit commissions for cosmetics and possibly shoe department sales employees.

Hardy's testimony regarding the exclusion of cosmetics sales commissions from the language of what has

become article 10.07 is confirmed by several objective factors. First, it is undisputed that as proposed initially, the provision had contained the word "commissions" and that the parties had agreed to delete that word when the Union had objected to its inclusion. Second, as set forth above, Hendricks testified that the provision had been proposed in 1969 to alleviate a problem—changes in policies concerning discounts—that is unrelated to commissions. Third, during the negotiations for the current agreement, Hendricks had made it a point to raise the issue of the scope of article 10.07, observing that the Respondent construed it as covering commissions. Yet, had the bargaining history until that time been so clear as the Respondent now attempts to portray it, seemingly there would have been no need for Hendricks to have felt that he needed to raise the subject of coverage of commissions by article 10.07. That he did so is some evidence that, based on prior agreements and on bargaining history, the Respondent had doubts that the Union would accept the Respondent's interpretation of the clause. Furthermore, there is no basis for concluding that Hendricks' remark about article 10.07 covering commissions, made during negotiations for the current agreement, sufficed to create a waiver of the Union's right to negotiate about that subject. For, there is no evidence that the Union's representatives had acquiesced in his interpretation of it. Hendricks could not recall what had been said in response to his remark concerning article 10.07 covering commissions. Hardy testified that the Union always had opposed its application to commissions, whenever that subject had been broached.

Therefore, a preponderance of the evidence is not sufficient to conclude that article 10.07 constituted a waiver of the Union's statutory right to bargain concerning continuation and modification of cosmetics sales employees' commission rates. Nor can it be said that the Union's lack of success in obtaining agreement to a "company benefits" amendment to article 10.07's provisions gives rise to a waiver of its statutory right to bargain about changes in commissions. The Union's proposed amendment could only have pertained to subjects that the parties agreed had been covered by article 10.07. The parties did not agree that commissions was one of those subjects. Thus, to accept the Respondent's argument about the proposed "company benefits" provision would mean that by proposing it, the Union thereby expanded the breadth of the very provision that the Union was attempting to limit. While an innovative feat of legerdemain, it hardly satisfied the "clear and unmistakable" language and "conscious relinquishment" tests, described above, that must be satisfied to establish waiver of a statutory right. Inasmuch as there is no evidence that in discussing the "company benefits" amendment to article 10.07, the parties had given any consideration to its application to commissions, cf. *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), I conclude that its proposal and rejection do not serve as a waiver of the Union's right to bargaining concerning that subject.

Nor does article 8.10 give rise to a waiver of that right, although the issue is a much closer one than with article 10.07. On its face, article 8.10 would appear to accord the Respondent broad discretion to "reduce [wages, hours and working conditions, benefits, and other terms and conditions of employment] to the minimum herein prescribed without the consent of the union." Such broad language could be construed, absent other evidence, as a waiver of the Union's right to bargain concerning the Respondent's exercise of influence on third-party vendors' payment of commissions. Yet, a statutory right is at stake here and, as pointed out above, both the Board and at least one circuit court of appeals have cautioned that waivers of such rights should not be resolved by resort to a "simplistic formula." *Radioear Corp.*, supra; *Road Sprinkler Fitters Local Union No. 669*, supra.

It is undisputed that article 8.10 had been proposed solely to solve the Respondent's problem with having to negotiate whenever reducing or eliminating merit increases given under circumstances that had ceased to exist. Thus, it is a provision negotiated for a reason unrelated to payment of third-party vendor commissions to cosmetics sales employees. Moreover, it was negotiated against a background of union objections, voiced for over a decade, to waiving the right to negotiate about cosmetics sales employees' commissions. Indeed, that the Respondent, itself, only belatedly saw the possibility of applying article 8.10 to its actions leading to reduction of commission rates in January is shown by two events. First, during negotiations for the current agreement, in which article 8.10 first appears, Hendricks had raised the subject of cosmetics sales employees' commissions but only in connection with article 10.07. There is no evidence that there had been any discussion of the Respondent's proposed article 8.10 applying to that subject. Second, in its February 9 letter, replying to the Union's protest of the reduction in commission rates, the Respondent had grounded its contractual argument only on article 10.07, making no mention of article 8.10. These two events serve to reinforce the conclusion that, in negotiating it, the parties had not contemplated that article 8.10 would apply to commissions for cosmetics sales employees.

As set forth above, waiver of a statutory right contemplates a conscious or clear relinquishment of that right. *Proctor & Gamble Mfg. Co.*, supra; *American Oil Co.*, supra. To permit parties to transpose contractual language intended to apply to a limited situation to wholly unrelated and separate situations, to which there had been no discussion or consideration concerning application, would reduce resolution of waiver issues to the very type of "simplistic formula" cautioned against by the Board and the Circuit Court of Appeals for the District of Columbia. Moreover, to do so would undermine the very process of resolving areas of common disputes through collective bargaining that national labor policy seeks to foster. *Ford Motor Co.*, supra.

Therefore, in light of the evidence that article 8.10 had been intended to correct only the Respondent's problem concerning elimination of portions of wages attributable to prior merit increases reflecting circumstances no longer existing, and absent evidence that the parties had even contemplated the possibility that its language might be applied to reductions in third-party vendors' commis-

sion rates for cosmetics sales employees, I conclude that article 8.10 does not serve to establish a waiver of the Union's right to prior notification of and the opportunity to bargain about actions by the Respondent leading to reduction of the rates of those commissions.

CONCLUSIONS OF LAW

1. Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit appropriate for bargaining is: The unit of employees described in the collective-bargaining agreement between Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary and Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, dated July 21, 1980.

4. At all times material, Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. By failing to notify and afford an opporunity to bargain to Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, about its decision to request that third-party vendors consider reducing commission rates paid by them to cosmetics sales employees included in the appropriate bargaining unit described in Conclusion of Law 3 above, Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary, has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary, engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to reinstate, on request by Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, the commission rates paid to cosmetics sales employees before January 5, 1981, to maintain those rates in effect until such time as it has satisfied its obligation to bargain concerning its requests to vendors for changes in those rates, and to make cosmetics sales employees whole for any losses sustained by virtue of the changes in those rates on January 5, 1981, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), enf. denied on different grounds 322 F.2d 913 (9th Cir. 1963), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[8]

The Respondent, Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to notify and afford an opportunity to bargain to Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, about decisions to request that third-party vendors consider reducing rates of commissions paid by them to employees included in the appropriate bargaining unit described in Conclusion of Law 3 above.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Upon request by Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, reinstate commission rates paid to cosmetics sales employees, included in the appropriate bargaining unit described in Conclusion of Law 3 above, to levels existing before January 5, 1981, and maintain those commission rates in effect until such time as it has satisfied its bargaining obligation concerning them.

(b) Make whole cosmetics sales employees, in the appropriate bargaining unit described in Conclusion of Law 3 above, for any losses sustained by them as a result of the changes in cosmetics sales commission rates made on January 5, 1981, with interest on the amounts owing, in the manner set forth in the remedy section of this Decision.

(c) Preserve and, on request, make available to the Board or its agents all payroll and other records necessary to compute the backpay set forth in the remedy section of this Decision.

(d) Post at all department stores covered by its collective-bargaining agreement with Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted immediately upon

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT fail to notify Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO, and afford it an opportunity to bargain about decisions made by us to request third-party vendors to consider reducing commission rates paid by them to employees represented by that labor organization in the following appropriate bargaining unit:

> The unit of employees described in the collective-bargaining agreement between Pay 'N Save Corporation d/b/a Lamont's Apparel, Inc., A Wholly Owned Subsidiary and Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO, dated July 21, 1980.

WE WILL NOT in any like or related manner interfere with your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, on request by Retail Store Employees Union, Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO, reinstate commission rates paid to cosmetics sales employees, included in the above-described bargaining unit, to the levels existing before January 5, 1981, and maintain those commission rates in effect until such time as we have satisfied our bargaining obligation concerning them.

WE WILL make cosmetics sales employees in the above-described bargaining unit whole for any losses sustained by them as a result of the changes in cosmetics sales commission rates made on January 5, 1981, with interest on the amounts owing.

PAY 'N SAVE CORPORATION D/B/A LAMONT'S APPAREL, INC., A WHOLLY OWNED SUBSIDIARY